CHEAH THEAM KHENG A

v.

CITY CENTRE SDN BHD (IN LIQUIDATION) & OTHER APPEALS B

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
SULONG MATJERAIE JCA
RAMLY ALI JCA
[CIVIL APPEALS NO: W-02(IM)-124-2010, C
W-02(IM)-286-2010 & W-02(IM)-287-2010]
14 SEPTEMBER 2011

COMPANY LAW: *Liquidation - Liquidator, duties of - Sale of company's property - Liquidator required by court order to act with a committee of inspection - Whether liquidator could sell company's lands without setting up any committee of inspection - Whether liquidator has unfettered powers to act as he deems fit - Whether directions of committee of inspection mandatory for sale of company's property - Companies Act 1965, ss. 236, 237(1) & 241(1)* D E

COMPANY LAW: *Winding up - Liquidators - Committee of inspection - Whether liquidator could act alone without appointing committee of inspection - Whether directions of committee of inspection mandatory for sale of company's property* F

The three appeals herein arose from an order of the High Court wherein the High Court approved the sale of lands belonging to the respondent, namely, City Centre Sdn Bhd (in liquidation) ('City Centre') who acted by its liquidator by the name of Chuah Seong Phaik ('the liquidator') to North Plaza Sdn Bhd ('North G Plaza') pursuant to a sale and purchase agreement dated 9 January 2007. The appellant ('CTK') was a creditor, director and contributory of City Centre. Equiticorp Holdings Ltd (in statutory liquidation) was a creditor of City Centre. United Securities Sdn Bhd (in liquidation) ('United Securities') was a H creditor and contributory of City Centre. The liquidator was appointed pursuant to a High Court order dated 26 July 2001 which ordered the liquidator to act with a committee of inspection. However, the liquidator did not set up any committee of inspection. City Centre was the owner of 16 parcels of land I ('the lands'). City Centre was at the date of its winding-up wholly

A illiquid and had no ready funds. The lands represented its sole substantial asset. The liquidator conducted two tender exercises. The first tender exercise did not yield any good offer. In the second tender exercise, the highest bid was received from North Plaza which bidded at RM163 million. This was followed by SP
B Setia Berhad at RM129,068,712. After the immediate closure of the second tender exercise, the liquidator's solicitors were served with an unsealed copy of CTK's application to injunct the sale of the lands. Upon been informed by the liquidator about CTK's injunction application, North Plaza then sought to revoke their
C offer unless new terms could be agreed upon. Hence, the liquidator therefore agreed to a new reduced offer price of RM158 million and that to the dismissal of the injunction application. The liquidator then applied for approval for the sale of the lands to North Plaza. The High Court allowed the liquidator's application
D and approved the sale of the lands to North Plaza. The appellants thus filed this appeal claiming that the liquidator had, in agreeing to sell the lands to North Plaza, acted contrary to the High Court order dated 26 July 2001 since the liquidator could not act alone without the committee of inspection.

E

Held (allowing the appeals with cost)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

F **(1)** Prior to the liquidator's acceptance of any of the offers that came as a result of the second tender exercise, CTK filed an injunction application seeking to restrain the carrying on of the second tender exercise and impugning the liquidator in his conduct of the administration of the lands. At that juncture,
G the liquidator ought to have put on hold the acceptance of any offer in order to investigate the concerns of the creditors and contributories. (para 36)

(2) Having filed proofs of debt, CTK, Equiticorp and United Securities had *locus standi* in these appeals. (para 53)

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(3) There was no obedience to the High Court order dated 26 July 2001 by the liquidator and this question was not considered by the learned High Court Judge when approving the sale of the lands to North Plaza. (para 88)

I

(4) The learned High Court Judge failed to appreciate the provisions of s. 237(1) of the Companies Act 1965 ('CA65') which regulates the exercise and control of the liquidator's power. (para 89)

(5) Section 241(1) of the CA65 was not applicable because the High Court by its order dated 26 July 2001 had already made the determination that the liquidator was to act with a committee of inspection. The liquidator was obliged to do so. (para 92)

(6) The learned High Court Judge failed to appreciate that the exercise by the liquidator of the powers conferred on him by s. 236 of the CA65 was subject to the control of the court as provided for in s. 236(3). The learned High Court Judge also failed to appreciate that the liquidator did not have unfettered powers to act as he deemed fit. He was limited in the exercise of his powers by the High Court order dated 26 July 2001 as well as the Companies Act 1965, to act with the committee of inspection. (paras 93 & 94)

(7) The learned High Court Judge failed to appreciate that directions of the committee of inspection are mandatory for such sale. It was not an option on the part of the liquidator to act without the committee of inspection. The sale of the lands to North Plaza was tainted and sanction for the same should not have been granted by the learned High Court Judge. (para 95)

(8) The liquidator had to comply with the High Court order dated 26 July 2001 unless it was set aside in a direct proceeding for that purpose. The validity of the said High Court order could not be attacked or challenged laterally as was done before the learned High Court Judge and now before this court. (paras 100 & 101)

Bahasa Malaysia *Translation Of Headnotes*

Ketiga-tiga rayuan di sini berbangkit daripada perintah Mahkamah Tinggi di mana Mahkamah Tinggi telah meluluskan penjualan tanah-tanah kepunyaan responden, iaitu, City Centre Sdn Bhd (dalam penyelesaian) ('City Centre') yang telah diwakili oleh likuidatornya dengan nama Chuah Seong Phaik ('likuidator') kepada North Plaza Sdn Bhd ('North Plaza') melalui satu

perjanjian jual beli bertarikh 9 Januari 2007. Perayu ('CTK') adalah pemiutang, pengarah dan penyumbang City Centre. Equticorp Holdings Ltd (dalam penyelesaian statutori) merupakan pemiutang City Centre. United Securities Sdn Bhd (dalam penyelesaian) ('United Securities') merupakan pemiutang dan penyumbang City Centre. Likuidator dilantik melalui perintah Mahkamah Tinggi bertarikh 26 Julai 2001 yang telah memerintahkan likuidator untuk bertindak dengan jawatankuasa pemeriksaan. Walaubagaimanapun, likuidator tidak menubuhkan sebarang jawatankuasa pemeriksaan. City Centre adalah pemilik bagi 16 bidang tanah ('tanah tersebut'). City Centre telah pada tarikh ianya digulungkan tidak cair sepenuhnya dan tidak mempunyai dana sedia ada. Tanah tersebut merupakan aset tunggalnya. Likuidator telah menjalankan dua pelaksanaan tender. Pelaksanaan tender pertama tidak menghasilkan sebarang tawaran yang baik. Di dalam pelaksanaan tender kedua, tawaran tertinggi telah diterima daripada North Plaza yang telah menawar RM163 juta. Ini diikuti oleh SP Setia Berhad untuk RM129,068,712. Selepas penutupan segera pelaksanaan tender kedua, peguamcara likuidator telah diserahkan dengan sesalinan tidak bermeterai permohonan CTK untuk menghalang penjualan tanah tersebut. Setelah dimaklumkan oleh likuidator mengenai permohonan injunksi CTK tersebut, North Plaza telah membatalkan tawaran mereka kecuali jika terma-terma baru boleh dipersetujui. Oleh itu, likuidator telah bersetuju dengan tawaran baru di mana harganya dikurangkan kepada RM158 juta dan kepada pembatalan permohonan injunksi. Likuidator telah kemudiannya memohon untuk kelulusan bagi penjualan tanah tersebut kepada North Plaza. Mahkamah Tinggi telah membenarkan permohonan likuidator dan telah meluluskan penjualan tanah tersebut kepada North Plaza. Perayu-perayu telah memfailkan rayuan ini dengan menuntut bahawa likuidator telah, dalam menyetujui untuk menjual tanah tersebut kepada North Plaza, bertindak sebaliknya terhadap perintah Mahkamah Tinggi bertarikh 26 Julai 2001 memandangkan likuidator tidak boleh bertindak seorang diri tanpa jawatankuasa pemeriksaan.

Diputuskan (membenarkan rayuan-rayuan dengan kos)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Sebelum penerimaan likuidator berkenaan sebarang tawaran yang telah datang hasil daripada pelaksanaan tender kedua, CTK telah memfailkan permohonan injunksi untuk menghalang perjalanan pelaksanaan tender kedua dan mempertikaikan

likuidator dalam mentadbir tanah tersebut. Pada masa itu, likuidator sepatutnya menangguhkan penerimaan sebarang tawaran untuk menyiasat khuatiran pemiutang-pemiutang dan penyumbang-penyumbang. A

(2) Setelah memfailkan bukti-bukti hutang, CTK, Equiticorp dan United Securities mempunyai *locus standi* dalam rayuan-rayuan ini. B

(3) Tidak ada pematuhan kepada perintah Mahkamah Tinggi bertarikh 26 Julai 2001 oleh likuidator dan persoalan ini tidak dipertimbangkan oleh yang arif hakim Mahkamah Tinggi apabila meluluskan penjualan tanah tersebut kepada North Plaza. C

(4) Yang arif hakim telah gagal menghargai peruntukan s. 237(1) Akta Syarikat 1965 ('AS65') yang mengawal pelaksanaan dan pengawalan kuasa likuidator. D

(5) Seksyen 241(1) AS65 tidak terpakai kerana Mahkamah Tinggi melalui perintahnya bertarikh 26 Julai 2001 telah membuat penentuan bahawa likuidator hendaklah bertindak dengan jawatankuasa pemeriksaan. Likuidator mempunyai obligasi untuk berbuat sedemikian. E

(6) Yang arif hakim telah gagal menghargai bahawa pelaksanaan oleh likuidator mengenai kuasa yang diberikan kepadanya oleh s. 236 AS65 tertakluk kepada kawalan mahkamah seperti yang disediakan di bawah s. 236(3). Yang arif hakim juga telah gagal menghargai bahawa likuidator tidak mempunyai kuasa tanpa batasan untuk bertindak seperti yang dianggapnya sesuai. Likuidator mempunyai kuasa terbatas oleh perintah Mahkamah Tinggi bertarikh 26 Julai 2001 dan Akta Syarikat 1965, untuk bertindak dengan jawatankuasa pemeriksaan. F G

(7) Yang arif hakim telah gagal menghargai bahawa arahan jawatankuasa pemeriksaan adalah mandatori bagi penjualan sebegitu. Ianya bukan satu pilihan bagi likuidator untuk bertindak tanpa jawatankuasa pemeriksaan. Penjualan tanah tersebut kepada North Plaza telah dicemari dan sanksi untuk yang sama tidak sepatutnya diberi oleh yang arif hakim Mahkamah Tinggi. H

(8) Likuidator mesti mematuhi perintah Mahkamah Tinggi bertarikh 26 Julai 2001 kecuali jika ianya telah diketepikan dalam suatu prosiding langsung bagi tujuan tersebut. Kesahan perintah I

A Mahkamah Tinggi bertarikh 26 Julai 2001 tidak boleh disanggah atau dicabar seperti yang telah dibuat di hadapan yang arif hakim Mahkamah Tinggi dan kini di hadapan mahkamah ini.

B **Case(s) referred to:**

Abric Project Management Sdn Bhd v. Palmshine Palza Sdn Bhd & Anor [2007] 7 CLJ 516 HC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Cheah Theam Swee & Anor v Overseas Union Bank Ltd & Ors [1989]
C *1 CLJ 157; [1989] 1 CLJ (Rep) 386 HC* ***(refd)***

Express Newspapers Plc v. News (UK) Ltd And Others [1990] 3 All ER 376 ***(refd)***

Hadkinson v. Hadkinson [1952] 2 All ER 567 ***(refd)***

Howitt Transport Ltd v. Transport and General Workers' Union [1973] ICR 1
D ***(refd)***

Leon v. York-O-Matic, Ltd And Others [1966] 3 All ER 277 ***(refd)***

Mosbert Berhad (In Liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC ***(refd)***

North Plaza Sdn Bhd v. United Securities Sdn Bhd [2010] 1 CLJ 470 CA ***(refd)***

E *Northbourne Developments Pty Ltd v. Reiby Chambers Pty Ltd And Others [1989] 19 NSWLR 434* ***(refd)***

Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd [1985] 1 LNS 122 SC ***(refd)***

Re Bairnsdale Food Products Ltd (In Liquidation) [1948] VLR 264 ***(refd)***

F *Re Edennote Ltd (No 2) [1997] 2 BCLC 89* ***(refd)***

Re Kian Joo Holding Sdn Bhd; Abdul Jabbar Abdul Majid & Anor (Applicants) [1999] 4 CLJ 313 HC ***(refd)***

Re Spedley Securities Ltd (in liq), Re Spedley Holdings Ltd (in liq), Re Aldershot Ltd (in liq) [1992] 9 ACSR 83 ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993]
G *3 CLJ 210; [1993] 3 BLJ 123 SC* ***(refd)***

Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors [2000] 1 LNS 335 HC ***(foll)***

Zainudin Muhammad v. ATSCO Ltd & Anor [2003] 1 CLJ 446 CA ***(refd)***

Legislation referred to:

H Companies Act 1965, ss. 4, 232(8), 236(1), (2)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (3), 237(1), (3), 241(1)

Companies (Winding-Up) Rules 1972, r. 194(2)

Evidence Act 1950, s. 57(1)

Local Government Act 1976, s. 148(2)

I

Companies (NSW) Code, s. 377(2)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k)

Companies Act 1938 [UK], s. 191(2)(l)

Other source(s) referred to:
MN Rao & Amita Dhanda, *NS Bindra's Interpretation of Statutes*, 10th edn, p 427

(Civil Appeal No: W-02(IM)-124-2010)
For the appellant - Dato' V Manokaran (S Tilaga with him); M/s Megat Najmuddin Leong & Co
For the respondent - Robert Low (CHL Ooi & Helen Lim with him); M/s Ranjit Ooi & Robert Low
For North Plaza Sdn Bhd - Wong Kian Kheong (Karen Lee with him); M/s Wong Kian Kheong

(Civil Appeal No: W-02(IM)-286-2010)
For the appellant - Shanti Mogan (SY Liew with him); M/s Shearn Delamore & Co
For the respondent - Robert Low (CHL Ooi & Helen Lim with him); M/s Ranjit Ooi & Robert Low
For North Plaza Sdn Bhd - Wong Kian Kheong (Karen Lee with him); M/s Wong Kian Kheong

(Civil Appeal No: W-02(IM)-287-2010)
For the appellant - Olivia Loh; M/s Gananathan Loh
For the respondent - Robert Low (CHL Ooi & Helen Lim with him); M/s Ranjit Ooi & Robert Low
For North Plaza Sdn Bhd - Wong Kian Kheong (Karen Lee with him); M/s Wong Kian Kheong

Reported by Amutha Suppayah

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] There were three appeals before us, namely:

(a) Civil Appeal No: W-02(IM)-124-2010

Cheah Theam Kheng v City Centre Sdn Bhd (In Liquidation) ("the CTK's Appeal").

(b) Civil Appeal No: W-02(IM)-286-2010

(i) Equiticorp Holdings Ltd (In Statutory Liquidation)

(ii) *Equiticorp Financial Services Ltd (In Statutory Liquidation) v City Centre Sdn Bhd (In Liquidation)* ("the Equiticorp Appeal").

(c) Civil Appeal No: W-02(IM)-287-2010

United Securities Sdn Bhd (In Liquidation) v. City Centre Sdn Bhd (In Liquidation) ("United Securities Appeal").

[2] Since the issues raised in all the three appeals are common to one another, they were heard together before us.

[3] The three appeals arose from the order of the High Court *vide* Kuala Lumpur High Court Companies (Winding-Up) No: D6-28-9-2000 on 21 December 2009 wherein by that order the High Court approved the sale of the lands belonging to the respondent, namely, City Centre Sdn Bhd (in liquidation) ("City Centre") who acted by its liquidator by the name of Chuah Seong Phaik ("the liquidator") to North Plaza Sdn Bhd ("North Plaza") pursuant to a sale and purchase agreement dated 9 January 2007. The order of the High Court was made on the application by the liquidator in encl. 71 for directions by way of a summons in chambers dated 10 January 2007 ("the liquidator's application").

Who Are The Appellants?

[4] Cheah Theam Keng ("CTK"), the appellant in the CTK's appeal, is a creditor and contributory of City Centre. CTK has filed a proof of debt in the liquidation of City Centre for a debt of RM27,023.04. CTK was also a director of City Centre prior to the liquidation of City Centre.

[5] Equiticorp Holdings Ltd (In Statutory Liquidation), the first appellant in the Equiticorp Appeal, is a creditor of City Centre for a debt of RM306,903. While Equiticorp Financial Services Ltd (In Statutory Liquidation), the second appellant in the Equiticorp Appeal, is not a creditor of City Centre and does not claim to be one. However, it claims to be a creditor of Cheah Theam Swee - the brother of CTK.

[6] United Securities Sdn Bhd (In Liquidation) ("United Securities"), the appellant in the United Securities Appeal, is a creditor of City Centre and has filed a proof of debt in the liquidation of City Centre for a debt of RM3,571,312.65. United Securities is also a contributory of City Centre. At all material times, United Securities was in receivership. And United Securities was wound up pursuant to an order of the High Court on 30 January 2007. The main shareholders of United Securities are CTK and his brother by the name of Cheah Theam Swee.

[7] At all material times prior to the winding-up of United Securities, CTK as a director of United Securities represented United Securities in the winding-up proceedings including United Securities opposition to the liquidator's application. And subsequent to United Securities winding-up, the liquidator of United Securities has had conduct of United Securities opposition to the liquidator's application.

The Salient Facts

[8] City Centre was wound up pursuant to an order of the High Court *vide* Kuala Lumpur High Court (Companies Winding-Up) No: D6-28-9-2000 ("the winding-up proceedings") on 25 April 2000.

[9] The liquidator was appointed as the liquidator of City Centre pursuant to an order of the High Court made in the winding-up proceedings on 26 July 2001 ("the High Court order dated 26 July 2001"). The High Court order dated 26 July 2001 can be seen at pp. 5 to 6 of the appeal record at Bahagian "C", Jilid 1 and it was worded as follows:

> Di Hadapan Yang Arif Tuan Hakim Datuk Kesturi Lal Rekraj,
> Pada 26 Haribulan Julai 2001
>
> DALAM KAMAR
>
> PERINTAH
>
> ATAS PERMOHONAN Pegawai Penerima dari Pelikuidasi Sementara DAN SETELAH MEMBACA Saman Untuk Menimbangkan Laporan Mesyuarat Pertama Pemiutang dan Penyumbang di bawah Seksyen 227(2) dan Seksyen 241 Akta Syarikat 1965 dan Kaedah-Kaedah 46 Kaedah-Kaedah Penggulungan Syarikat, 1972, bertarikh 12hb Jun 2001 DAN SETELAH MENDENGAR Encik Azman Aiyub untuk Pegawai Penerima dan Pelikuidasi Sementara, Encik Surinder Singh Gill bagi pihak Lim Choon Hong, Cheah Theam Kheng dan sebagai pengarah sendiri dan untuk United Securities Sdn Bhd dan Cheah Theam Swee sebagai mewakili diri sendiri DENGAN PERSETUJUAN ADALAH DIPERINTAHKAN:
>
> (1) Encik Chuah Seong Phaik dari Tetuan Paul Chuah & Co. dilantik sebagai Pelikuidasi untuk City Centre Sdn Bhd bersama dengan Jawatankuasa Pemeriksaan.

A Bertarikh pada 26 haribulan Julai 2001.

Sgd Illegible

Alwi Bin Abd Wahab
Timbalan Pendaftar
B Mahkamah Tinggi
Kuala Lumpur.

[10] The High Court order dated 26 July 2001 appointing the liquidator as City Centre's liquidator ordered the liquidator to act
C with a committee of inspection. It is not disputed that the liquidator for City Centre did not set up any committee of inspection.

[11] City Centre is the registered and beneficial owner of sixteen (16) parcels of freehold land held under titles Grant no: 5650 Lot
D no: 212, Grant no: 5651 Lot no: 213, Grant no: 25288 Lot no: 214, Grant no: 25289 Lot no: 215, Grant no: 25187 Lot no: 216, Grant no: 25188 Lot no: 217, Grant no: 860 Lot no: 223, Grant no: 861 Lot no: 224, Grant no: 862 Lot no: 225, Grant no: 863 Lot no: 226, Grant no: 864 Lot no: 227, HS(D) 85813
E Lot no: 1074, Grant no: 4384 Lot no: 417, Grant no: 25123 Lot no: 418, Grant no: 24859 Lot no: 419 and Grant no: 24860 Lot no: 420, all in section 57, Town and District of Kuala Lumpur, Wilayah Persekutuan ("the lands").

F **[12]** City Centre is and was at the date of its winding-up (if not prior thereto), wholly illiquid and has no ready funds. The lands represent its sole substantial asset.

[13] Now, given City Centre's illiquid state, the quit rent and
G assessment in respect of the lands have been, and remain, in arrears for over ten years. It is said that by the end of 2006 and 4 July 2007, the quit rent and assessment outstanding stood at RM790,162 and RM7,986,156 respectively.

[14] Approximately 15 years prior to the winding-up of City
H Centre, CTK and Cheah Theam Swee filed a civil suit against Overseas Union Bank Ltd ("OUB") and ten others *vide* Kuala Lumpur High Court Civil Suit No: 6837 of 1985 ("the 1985 suit"), alleging *inter alia*, that the shares in City Centre belonging to United Securities were transferred to OUB Nominees (Malaysia)
I Sdn Bhd ("OUB Nominees") as security for the loan extended by OUB to United Securities. In the 1985 suit, both CTK and

Cheah Theam Swee contended that the said loan was illegal and sought orders, *inter alia*, that the shares in City Centre be returned to United Securities. To date, the 1985 suit is still pending.

[15] Appraised of all these facts, the liquidator of City Centre in the performance of his duties took the necessary steps to realise the lands for the purposes of applying the proceeds thereof towards settlement of the creditors of City Centre and the distribution of any surplus thereafter to the contributory of City Centre.

[16] But whatever the liquidator of City Centre did, he did it unilaterally. He did not act with a committee of inspection.

[17] To assist him in disposing of the lands, the liquidator had obtained valuations of the lands from estate agents Henry Butcher Malaysia Sdn Bhd ("Henry Butcher") and Rahim & Co Chartered Surveyors Sdn Bhd ("Rahim & Co"). Now, Henry Butcher valued the lands at approximately RM110 million as at 5 October 2004 while Rahim & Co valued the lands at approximately RM90 million as at 29 November 2006.

[18] The liquidator conducted two tender exercises. One commencing sometime in late 2004 and closing on 24 January 2005 ("the first tender exercise"). The other was held sometime on 13 October 2006 and closed on 30 November 2006 ("the second tender exercise"). Despite extensive exposure in terms of advertisement and marketing of the lands as well as the release of 22 tender packages to prospective purchasers, the first tender exercise only yielded one offer at RM64,534,356. The liquidator rejected this offer forthwith.

[19] On the advice of Henry Butcher, the second tender exercise was carried out on a more restricted basis. Here, Henry Butcher focussed its attention on parties who had previously indicated an interest in the lands as well as others obtained and identified from Henry Butcher's databases and/or contacts. It must be mentioned that the second tender exercise was also advertised in The Star on 21 November 2006. This time, a total of 44 tender packages were issued to various prospective purchasers pursuant to the second tender exercise. The second tender exercise yielded five bids - two of which were non-conforming. The highest bid received for the purchase of the lands was from

North Plaza who bidded at RM163 million. This was followed by SP Setia Berhad at RM129,068,712 and by Asia Equity Partners Pte Ltd at RM122,600,000. It must be stated that the non-performing bids were all below RM122 million.

[20] After the immediate closure of the second tender exercise, the liquidator's solicitors were served with an unsealed copy of CTK's application to injunct the sale of the lands by way of a summons in chambers dated 1 December 2006. Notwithstanding receipt of the unsealed copy of CTK's application for an injunction, the liquidator proceeded to accept North Plaza's offer to purchase the lands at RM163 million. This offer by North Plaza is said to be by far the highest received and well exceeded the market value as listed in Henry Butcher's valuation report. North Plaza's offer also conformed with the tender pre-conditions including the provision of an earnest deposit of RM500,000. The liquidator also informed North Plaza of CTK's injunction application.

[21] Upon been informed by the liquidator about CTK's injunction application, North Plaza then sought to revoke their offer unless new terms could be agreed upon. Among the new terms were a new reduced offer price of RM158 million and the dismissal of the injunction application. At all material times, the new terms were acceptable to the liquidator bearing in mind that:

(a) the new offer price of RM158 million was still far above that of the next closest offer by SP Setia Berhad at RM129,068,712;

(b) the new term that CTK's injunction application be dismissed was understandable as the uncertainties associated with the legal proceedings would be discouraging to any purchaser and it would involve a big sum of money and any purchaser would want to purchase the lands and utilise it as soon as possible; and

(c) North Plaza had always evinced an intention not to sell the lands for profit but rather to develop City Centre lands for their own use.

[22] The liquidator accepted the revised offer by North Plaza and the parties subsequently entered into a sale and purchase agreement in respect of the lands on 9 January 2007 at the purchase price of RM158 million and thereafter the liquidator filed the liquidator's application.

[23] It is said that the proceeds of the sale of the lands to North Plaza will be sufficient to settle all the creditors of City Centre as presently disclosed to the liquidator and will leave a substantial surplus for distribution to the contributories of City Centre, be it United Securities or UOB.

[24] The liquidator's application by way of a summons in chambers for directions in encl. 71 dated 10 January 2007 was filed pursuant to s. 237(3) of the Companies Act 1965 and/or the inherent jurisdiction of the High Court can be seen at pp. 22 to 26 of the appeal record at Bahagian "A" and "B" and in that application the liquidator sought for the following orders:

(1) that approval be given for the sale of the lands belonging to City Centre on the terms and conditions as stipulated in the sale and purchase agreement dated 9.1.2007 entered between the liquidator and North Plaza as annexed in exhibit 'PC-20' of the affidavit of the liquidator in support of this application;

(2) that any surplus from the proceeds of sale of the said lands due for distribution to the contributory/ contributories of City Centre be paid into an interest bearing stakeholder's account pending further orders of the High Court;

(3) that failing any agreement as to the identity of the stakeholder, the High Court to appoint a stakeholder subject to reasonable fees being paid to such stakeholder;

(4) that if prayer (1) is granted by the High Court, that Cheah Theam Swee, CTK, Lim Choon Hong, their servants, agents, nominees and/or howsoever otherwise, be restrained from interfering in any way in the sale of the said lands;

(5) such further or other directions as the High Court deems appropriate in respect of the conduct and/or execution of the sale of the said lands;

(6) that costs of this application be provided for; and

(7) such further or other relief as the High Court deems fit and proper to be granted.

[25] It is said that the liquidator's application was prompted and necessitated by reason of, amongst others, the 1985 suit, the applications filed by CTK and/or United Securities against the liquidator for the liquidator's removal as the liquidator of City Centre by way of a summons in chambers dated 17 January 2005 and CTK's injunction application.

[26] It must be borne in mind that North Plaza had applied to intervene in the liquidator's application in encl. 71 and the High Court had, on 6 December 2007, allowed North Plaza's application to intervene.

[27] The following parties had applied for leave of the High Court to intervene in the liquidator's application in encl. 71 in order to oppose encl. 71:

(a) CTK, who is City Centre's creditor;

(b) Equiticorp, who is City Centre's creditor; and

(c) United Securities, who is a contributory of City Centre.

[28] The High Court allowed the liquidator's application in encl. 71 which in effect approved the sale and purchase of the lands dated 9 January 2007 entered between the liquidator and North Plaza. The order of the High Court in relation to encl. 71 has been extracted and it is dated 21 December 2009 and it can be seen at pp. 17 to 21 of the appeal record, Bahagian "A" and "B". All the parties including the appellants had by consent, agreed to be restrained from interfering in any way with the sale of the lands provided the parties are at liberty to exercise their rights of recourse to the courts.

[29] Dissatisfied with the High Court order dated 21 December 2009, the appellants (CTK, Equiticorp and United Securities) filed their appeals to this court.

[30] In the meantime, the appellants applied to this court for a stay of the High Court order dated 21 December 2009 and this court had, on 26 July 2010, granted the stay.

Analysis

[31] The High Court order dated 21 December 2009 threw to the wind another High Court order dated 26 July 2001 and it brought dissatisfaction to the present appellants here who now mounted these appeals before us.

[32] City Centre was wound up on 25 April 2000. By way of a High Court order dated 26 July 2001 as reproduced earlier in this judgment, by consent the liquidator was appointed on the following terms:

Encik Chuah Seong Phaik dari Tetuan Paul Chuah & Co dilantik sebagai Pelikuidasi untuk City Centre Sdn Bhd bersama dengan Jawatankuasa Pemeriksaan.

[33] The High Court order dated 26 July 2001 specifically ordered that the liquidator is appointed with the committee of inspection. But the liquidator, from the date of his appointment on 26 July 2001 till to date, has not appointed a committee of inspection. In actual fact, the liquidator has neither called for proof of debts nor finalised a list of creditors or called for a creditors and/or contributories meeting.

[34] The only act of the liquidator to date was to undertake the sale of the only asset of City Centre which consisted of the lands in question situated in the heart of Kuala Lumpur city and it is the subject matter of the present appeal before us.

[35] North Plaza has tendered to purchase the lands for a consideration of RM163 million. The liquidator gave a discount of RM5 million to North Plaza and entered into a sale and purchase agreement on 9 January 2007 with North Plaza for a consideration of RM158 million only.

[36] We have a situation that prior to the liquidator's acceptance of any of the offers that came as a result of the second tender exercise, CTK filed on 1 December 2006 an injunction application seeking to restrain the carrying on of the second tender exercise and impugning the liquidator in his conduct of the administration of the lands. In our judgment, at that juncture, the liquidator ought to have put on hold the acceptance of any offer in order to investigate the concerns of the creditors and contributories. But sad to say, he did not. Instead the liquidator informed North Plaza of the injunction application. And on 20 December 2006, North Plaza promptly requested for a RM5 million price-reduction. A mere two days later, the liquidator acted independently and acceded to a RM5 million reduction requested by North Plaza. The liquidator accepted the reduced price of RM158 million and thereafter filed the liquidator's application.

[37] In the liquidator's application that was filed on 10 January 2007 and as reproduced earlier in this judgment, the liquidator applied to the High Court for, *inter alia*, an order that approval be given for the sale of the lands to North Plaza on the terms of the sale and purchase agreement dated 9 January 2007 between the liquidator and North Plaza.

[38] CTK opposed the liquidator's application in his capacity as a creditor and contributory on the grounds that the High Court order dated 26 July 2001 required a committee of inspection to be set up and the liquidator therefore cannot sell the lands without a committee of inspection being set up.

[39] Equiticorp also challenged the liquidator's application on two grounds. Firstly, without appointing a committee of inspection as required by the High Court order dated 26 July 2001, the liquidator unilaterally sold the lands to North Plaza thereby depriving the creditors and contributories whose interests would have been represented by the committee of inspection from furnishing their views about whether the lands ought to be sold and if so, the manner and price of the sale. Secondly, that there were irregularities in the sale of the lands. The sale and purchase agreement to sell the lands to North Plaza was conducted in unholy haste and the purchase price was not reflective of the market price.

[40] Likewise, United Securities mounted an objection to the liquidator's application and argued that what the liquidator did was done without the benefit of the committee of inspection.

[41] City Centre argued that the CTK's appeal, the Equiticorp Appeal and the United Securities Appeal ought to be dismissed with costs. According to City Centre, the High Court order dated 21 December 2009 was correctly made by the learned High Court judge.

[42] City Centre argued that none of the appellants have a valid interest in the sale of the lands to North Plaza or an interest which is not addressed by the sale of the lands to North Plaza.

[43] City Centre emphasised that the sale of the lands at the price agreed by the liquidator will produce an amount sufficient to fully pay off all of its creditors. And that the creditors will not be prejudiced by the sale but instead they would gain by it.

[44] CTK, Equiticorp and United Securities are the creditors of City Centre and they have filed proofs of debt to that end and these debts will be paid in full from the proceeds of the sale of the lands provided that the debts are ultimately admitted by the liquidator. City Centre argued that the proceeds of the sale of the lands would amply cover their debts and that their interests as creditors are not in any manner prejudiced by the sale of the lands to North Plaza. According to City Centre, their objections as creditors are entirely incomprehensible. It can be surmised, according to City Centre, that their objections were made in bad faith. City Centre argued that only a creditor who will be prejudiced by the sale may object and that a creditor who is going to be paid its debt to the last cent has no locus standi to object.

[45] On the position of United Securities as the contributory, City Centre argued that UOB Nominees is the sole member of City Centre as disclosed in the register of members of the City Centre as at the date of the winding-up of City Centre. The shares were pledged by United Securities to UOB and these shares were then transferred to and registered in the name of UOB Nominees.

[46] Both CTK and United Securities asserted that United Securities is the beneficial and true owner of all the shares in the City Centre and is therefore the true contributory of City Centre, yet both of them remained conspicuously silent on the 1985 suit. It is argued that United Securities has not taken a clear position in regard to the 1985 suit or the status thereof.

[47] No evidence has been tendered in regard to United Securities ability to redeem the shares in the City Centre from UOB or that the lands can be realised at a price which is sufficient if distributed to United Securities as contributory in order to redeem the said shares. It is said that UOB, a secured creditor of United Securities, is owed USD106,203,407.08 as at 5 April 2007. And based on the indicative purchase prices as disclosed in the "offers" as produced by CTK, namely the BTG Corporation Sdn Bhd's offer to purchase the lands at the price of RM200 million ("the BTG offer") and the offer through Messrs Khong & Jaafar Sdn Bhd at RM550 per square foot with room to negotiate that came up to RM177,469,050 ("the Khong & Jaafar offer") neither of these would have been insufficient to settle the outstanding due to UOB.

[48] Our attention was drawn to the decision of another panel of this court in *North Plaza Sdn Bhd v. United Securities Sdn Bhd* [2010] 1 CLJ 470 where the other panel of this Court held that United Securities is not a contributory of City Centre. And while the other panel of this court was prepared to accept that United Securities had a beneficial interest in the shares, the other panel of this court was not prepared to go so far as to hold that United Securities was a contributory in relation to City Centre. In arriving at this conclusion, the other panel of this court considered the definition of "contributory" in s. 4 of the Companies Act 1965 which reads as follows:

> ... a person liable to contribute to the assets of the company in the event of being wound up, and includes the holder of fully paid shares in the company and, prior to the final determination of the persons who are contributories, includes any person alleged to be a contributory.

[49] We were urged not to arrive at a contrary finding which would result in two diametrically opposite conclusions. We were urged to rule that United Securities is not a contributory of City Centre and therefore lacks *locus standi* to complain about the sale of the lands to North Plaza.

[50] But we just cannot sweep under the carpet, so to speak, the facts that United Securities is the holding company of City Centre and the beneficial owner of 100% shareholding in City Centre. And that United Securities was wound up on 30 January 2007.

[51] It is argued that it is not true as regards the claim by CTK that it is a contributory of City Centre. It is pointed out that CTK appears to be a registered shareholder of United Securities who was at one time, but is not as at the date of the winding-up, a member of City Centre. It is stressed that as at the date of the winding-up, the sole registered member of City Centre is UOB Nominees. Thus, as matters stood as at the date of the winding-up (and remain to this date), CTK is a shareholder of a former shareholder of City Centre. In that capacity, it is argued that CTK does not stand to receive any direct distribution in the liquidation of City Centre from the proceeds of sale of the lands.

[52] In regard to Equiticorp's position as a creditor of United Securities and Cheah Theam Swee, it is argued that it falls beyond the boundaries of liquidation of City Centre. It is argued that Equiticorp's interest in the disposal of the lands is rather remote and far removed from the liquidation of City Centre. It is pointed out that (a) as a creditor of the former shareholder of City Centre, and (b) as the shareholder of the former shareholder of City Centre, Equiticorp cannot be within the liquidator's contemplation or concern.

[53] In our judgment, having filed proofs of debt, CTK, Equiticorp and United Securities have *locus standi* in these appeals and we have given them standing to argue in these appeals.

[54] Just like City Centre, North Plaza contended that the appeals ought to be dismissed with costs forthwith. North Plaza raised several interesting points and we will now allude to them in quick succession.

The Liquidator Has Statutory Powers To Sell The Lands

[55] The appellants main ground in support of their appeals hinged on the argument that the liquidator had, in entering into the sale and purchase agreement to sell the lands to North Plaza, acted contrary to the High Court order dated 26 July 2001. For fear of repetition, and for the sake of clarity, that High Court order was worded, *inter alia*, in this way:

> Encik Chuah Seong Phaik dari Tetuan Paul Chuah & Co dilantik sebagai Pelikuidasi untuk City Centre Sdn Bhd bersama dengan Jawatankuasa Pemeriksaan.

[56] The appellants contended, before the High Court when opposing encl. 71, that the liquidator could not act alone in the sale of the lands to North Plaza without the committee of inspection. The same argument was advanced before us.

[57] By way of a rebuttal, North Plaza argued in this way:

(a) That by virtue of s. 236(2)(c) of the Companies Act 1965 the liquidator may sell the immovable and moveable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels. And it is this statutory provision that allows the

liquidator to sell the lands even without the authority of the court. And flowing from this, it was argued that the liquidator did not have any legal obligation to file the liquidator's application in encl. 71 and yet he did out of an abundance of caution and, essentially, in exercising prudence.

(b) The Australian case of *Northbourne Developments Pty Ltd v. Reiby Chambers Pty Ltd And Others* [1989] 19 NSWLR 434 was referred to by North Plaza. There at pp. 434F, 439B to G and 440E to G, McLelland J held as follows:

(i) that s. 377(2)(c) of the Companies (New South Wales) Code ("Code") provides that a provisional liquidator has powers to "sell or otherwise dispose of, in any manner all or any part of the property of the company";

(ii) the Supreme Court Rules ("SCR") provides that subject to any directions of the court, a provisional liquidator shall have power to carry on the business of the Company and the powers specified in s. 377(2)(a) to (k) of the Code;

(iii) the SCR provides that the exercise of the provisional liquidator's powers conferred by the SCR is subject to the control of the winding-up Court (similar to our s. 236(3) of the Companies Act 1965); and

(iv) McLelland J held at p. 439F that there is no legal obligation for the provisional liquidator to seek court directions to sell the assets of the company as the provisional liquidator has express powers conferred on him by the Code to do so, but he may do so out of prudence.

[58] In the Supreme Court of New South Wales' case of *Re Spedley Securities Ltd (in liq), Re Spedley Holdings Ltd (in liq), Re Aldershot Ltd (in liq)* [1992] 9 ACSR 83, a decision of Giles J, the headnotes at pp. 83 to 84 are hereby reproduced:

> The liquidators of the companies in the proceedings moved the court for:
>
> (a) authority to compromise claims by and against the companies in proceedings in the court and the High Court of Justice in England; and
>
> (b) directions that they were justified in entering on behalf of the companies into the transactions recorded in the deeds which set out the compromises.

The applications were made pursuant to ss. 377(1) and 379(3) of the Companies (NSW) Code. A

The liquidators' opinion was that the compromises were the best available bearing in mind:

(a) the forecast prospects of success in the various claims by and against the companies and the inevitable uncertainty attendant upon forecasting prospects of success; B

(b) the delay and expense of resolving the claims by litigation, including the likelihood of appeal;

C

(c) as best as can be judged, the extent of recovery available from those against whom the companies have claims or their insurers; and

(d) the ability and the preparedness of those against whom the companies have claims to pay in order to compromise those claims. D

Opinions of counsel and solicitors put before the court broadly confirmed the prospects of success which the liquidators forecast in relation to the major claims.

E

Held, granting the authority and giving the directions sought:

(i) In controlling the exercise of the liquidators' powers pursuant to s. 377(5), the court looks to the interests of creditors.

Scarel Pty Ltd v. City Loan & Credit Corporation Pty Ltd [1988] 12 ACLR 730; 6 ACLC 213, considered. F

(ii) An authorisation by the court pursuant to s. 379(3) empowers the liquidator to do what he would otherwise not have the power to do, or at least, would not have power to do beyond s. 377(2) or authority given by the Committee of Inspection or a resolution of creditors. G

(iii) An application for directions by a liquidator essentially means an application whereby the liquidator may be guided in the conduct of the liquidation and protected against the allegations of breach of his duty. H

Re G B Nathan & Co Pty Ltd (in liq) [1991] 5 ACSR 673, considered.

(iv) In any application pursuant to s. 377(1) the court pays regard to the commercial judgment of the liquidator. I

Re Chase Corporation (Australia) Equities Pty Ltd [1990] 8 ACLC 1118, considered.

(v) In all but the simplest case commercial considerations play a significant part in whether a compromise will be for the benefit of creditors. Accordingly, the attitudes of creditors are important in applications such as the present.

Re English Scottish & Australian Chartered Bank [1893] 3 Ch 385; *Re Landmark Corporation Ltd* [1968] 1 NSWR 759; *Re Codisco Pty Ltd* [1974] CLC 40 - 126; *Sanderson v. Classic Car Insurances Pty Ltd* [1985] 10 ACLR 115, considered.

(vi) None of the companies' creditors found the compromises unacceptable.

(vii) The combined compromises of the companies were in the interests of creditors and were within the principles referred to in the judgment.

[59] The opening words of s. 236(1) of the Companies Act 1965 states as follows:

> The liquidator may with the authority either of the Court or of the committee of inspection."

[60] While the opening words of s. 236(2) of the Companies Act 1965 states as follows:

> The liquidator may.

[61] The legislative omission of the following words to s. 236(2) of the Companies Act 1965 "with the authority either of the court or of the committee of inspection" clearly demonstrates Parliament's intention that the list of matters specified in s. 236(2)(a) to (j) of the Companies Act 1965 are powers that can be exercised by the liquidator alone without the authority of either the court or the committee of inspection. That being the case, it was vigorously argued that the power of the liquidator to sell the lands clearly fall within s. 236(2)(c) of the Companies Act 1965.

[62] To bolster up its submission, North Plaza invited us to apply the "rule of exclusion" in interpreting the Companies Act 1965 by referring to *NS Bindra's Interpretation of Statutes*, 10th edn where the learned authors MN Rao and Amita Dhanda wrote at p. 427:

11. RULE OF EXCLUSION

Rule of exclusion is merely an auxiliary rule of construction adopted for the purpose of ascertaining the intention of the law-giver. It may be applied only when in the natural association of ideas, the contrast between what is provided and what is left out leads to an inference that that latter was intended to be left out. It may accordingly be held inapplicable if there exists a plausible reason for not including what is left out. And what is left out or excluded from another, must be of the same kind as the another.

Stone T says in *Graves v. New York* (*Abhoy Pada Sara v. Sudhir Kumar* AIR [1967] SC 115):

> It is true, that the silence of congress when it has authority to speak, may sometimes give rise to an implication as to the congressional purpose. The nature and extent of that implication depend upon the nature of the congressional power and the effect of its exercise.

[63] Incidentally, s. 236(2)(j) of the Companies Act 1965 states that, "The liquidator may do all such other things as are necessary for winding-up the affairs of the company and distributing its assets". Now, according to the Supreme Court of Victoria in the case of *Re Bairnsdale Food Products Ltd (In Liquidation)* [1948] VLR 264, in construing s. 191(2)(l) of the Victorian Companies Act 1938 which is in *pari materia* with our s. 236(2)(j) of the Companies Act 1965, the word "necessary" is not to be narrowly construed: everything that a reasonable man might consider necessary is covered.

[64] And so, it was argued that in a liquidation process, City Centre would act like any other reasonable man would have expected to act and that would be to sell the lands before its liquidation process could be completed.

The Sale And Purchase Agreement Dated 9 January 2007 For The Purchase Of The Lands Of North Plaza From The Liquidator At RM158 Million ("SPA")

[65] It was argued that the SPA was validly entered by the liquidator pursuant to the exercise of his powers under s. 236(2)(c) and (j) of the Companies Act 1965. It was stressed that the appellants did not obtain an injunction to restrain the liquidator from exercising any of his powers under the Companies Act 1965. CTK did file an injunction but he withdrew the same

A on 24 September 2007. The appellants also did not apply nor obtain a stay of City Centre's liquidation or a stay of the exercise of the liquidator's powers.

[66] It was argued that the High Court order dated
B 21 December 2009 correctly interpreted the words "bersama dengan Jawatankuasa Pemeriksaan" that appeared in the High Court order dated 26 July 2001 and such an interpretation was said to be in consonance with s. 241(1) of the Companies Act 1965.

C **[67]** It was argued that the High Court order dated 26 July 2001 appointing the liquidator cannot be construed to mean that the liquidator must act with the committee of inspection for the following reasons:

D (a) to argue otherwise would be to disregard the provisions of s. 236(2) of the Companies Act 1965 where the liquidator can, on its own, exercise its powers to do any of the things in s. 236(2)(a) to (j) of the Companies Act 1965;

E (b) to argue otherwise would be to disregard the intention of Parliament where Parliament had expressly intended to distinguish s. 236(1) of the Companies Act 1965 from s. 236(2) of the same Act by using different opening words;

F (c) to argue otherwise would be to restrict the liquidator's powers as set out in s. 236(2) of the Companies Act 1965 and it must be borne in mind that the intention of Parliament in enacting s. 241(1) of the Companies Act 1965 is certainly not to curtail the liquidator's powers in s. 236(2)(a) to (j) of the
G Companies Act 1965 for the simple reason that s. 241(1) of the same Act does not expressly state so. If it were otherwise, s. 241(1) of the same Act would carry the words "notwithstanding s. 236(2) of the Companies Act 1965" or s. 236(2) of the Companies Act 1965 would carry the words
H "subject to s. 241(1) of the Companies Act 1965";

(d) to argue otherwise would be to ignore the creditors and contributories of City Centre who do not want the liquidator to appoint a committee of inspection;

I

(e) to argue otherwise would be to ignore the fact that a liquidator has a discretion under s. 241(1) of the Companies Act 1965 whether or not to summon separate meetings of creditors and contributories to determine whether or not the creditors and contributories require the appointment of a committee of inspection; and

(f) to argue otherwise would be to ignore the fact that a liquidator is only compelled to convene such a meeting for the purpose as envisaged in s. 241(1) of the Companies Act 1965 provided it is at the request of the creditors and contributories and in the context of these appeals, the liquidator was not requested, at any time, by any creditor or contributory to do so.

[68] According to North Plaza, the intention of the learned High Court judge who recorded the High Court order dated 26 July 2001 appointing the liquidator for City Centre was not for the purpose of the committee of inspection to be appointed as joint liquidators for City Centre. North Plaza ventured to argue that had the intention been such, the High Court order dated 26 July 2001 would be drafted in this fashion:

> Encik Chuah Seong Phaik dari Tetuan Paul Chuah & Co dan Jawatankuasa Pemeriksaan dilantik sebagai Pelikuidasi Bersama untuk City Centre Sdn Bhd.

[69] In our judgment, North Plaza has ventured into the realm of speculation as to the true intention of the learned High Court Judge who had recorded the High Court order dated 26 July 2001 bordering on contempt.

[70] North Plaza further argued that even if assuming the appointment of the liquidator is now impugned, the SPA is still valid on the strength of the following provisions:

(a) Section 232(8) of the Companies Act 1965, a general provision for all liquidators, reads as follows:

> "subject to this Act the acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.

(b) rule 194(2) of the Companies (Winding-Up) Rules 1972 states as follows:

> No defect or irregularity in the appointment or election of a receiver, liquidator, or member of a committee of inspection shall vitiate any act done by him in good faith.

[71] We were urged not to disturb the SPA since the SPA is binding and there is no basis to set aside the SPA.

North Plaza Is A *Bona Fide* Purchaser Of The Lands For Valuable Consideration

[72] It was argued that North Plaza is a *bona fide* purchaser who waited in the cue for three years for the sale to be completed.

[73] We were urged to take into account the following salient factors in favour of North Plaza:

(a) that North Plaza is a special purpose vehicle formed and supported by its shareholders, namely Lion, AIG and Tasek with their strong financial resources and technical expertise to undertake property development of the lands;

(b) that North Plaza is a *bona fide* property developer who intends to develop the lands after all the conditions precedent in the SPA including obtaining the approval of the High Court as prayed for in encl. 71 are fulfilled;

(c) that North Plaza offered the highest bid in the tender offering the sale price of RM158 million which was RM28.93 million higher than the second highest bidder SP Setia Berhad with an offer of RM129,068,712; and

(d) that North Plaza is a *bona fide* third party purchaser and was not and had never been involved in City Centre's liquidation and had no knowledge at the time of the bid of matters concerning City Centre's liquidation except for matters that were disclosed in the SPA.

The Sale Of The Lands Was In City Centre's Best Commercial Interests

[74] We were urged to consider this issue as it would determine whether or not the appeals should be allowed. North Plaza submitted the following reasons to augment the submission that the sale was in the best commercial interests of City Centre:

(a) the lands are the only assets of City Centre;

(b) City Centre does not have any source of income;

(c) the sale is the only means to complete City Centre's liquidation;

(d) North Plaza made the highest bid, which was RM28.93 million more than SP Setia Berhad, a renowned real property developer;

(e) North Plaza's successful offer of RM158 million was the best offer bearing in mind that:

(i) it was RM48 million above the valuation prepared by Henry Butcher on 5.10.2004 which had valued the lands at RM110 million;

(ii) it was RM68 million above the valuation prepared by Rahim & Co on 29 November 2006 which had valued the lands at RM90 million; and

(iii) it was RM48 million above the offer of Wimanis Sdn Bhd who, incidentally, did not participate in the tender and had merely expressed its intention to purchase the lands at RM110 million through a letter dated 30 November 2006 which was the closing date of the tender.

(f) the lands were not easy to be disposed of and it was only after the second tender exercise that North Plaza became the highest bidder;

(g) Dewan Bandaraya Kuala Lumpur ("DBKL") may at any time attach and sell the lands by public auction under the Local Government Act 1976 for the simple reason that City Centre had failed to pay assessments, penalties and all other related charges which were in arrears pertaining to the lands amounting to RM7,986,156 as at 28 November 2006 and these arrears continue to accrue till to date;

(h) the liquidator has no financial means of settling the assessments which were in arrears except by way of completing the SPA with North Plaza and using the proceeds of the sale to settle these arrears in assessments;

(i) DBKL had already issued Form "H" dated 28 November 2006 to "attach" ten lots of the lands under the proviso to s. 148(2) of the Local Government Act 1976;

(j) if the ten lots were to be sold by public auction by DBKL, the remaining six lots would be adversely affected in that its value would slide downwards and would no longer be commercially feasible for North Plaza to develop it bearing in mind that all the 16 lots comprising the lands were contiguous in nature; and

(k) there is also the real risk that the lands may be forfeited by the State Authority or by the Federal Government in the case of the Federal Territory of Kuala Lumpur under section 100 of the National Land Code 1965 bearing in mind that the quit rents were in arrears and the penalty charges have accrued for more than six years; and

(l) if the lands were forfeited by the State Authority, City Centre would stand to lose RM158 million being the sale price offered by North Plaza and all the creditors and contributories of City Centre would also suffer and grave injustice would be occasioned.

[75] We anxiously considered North Plaza's submissions and we deliberated on them and we have this to say. It is the duty of City Centre to pay the relevant assessments and the State Authority should not be blamed if steps are taken to forfeit the lands under the National Land Code 1965.

[76] Be that as it may, we took into account the Supreme Court's case of *Mosbert Berhad (In Liquidation) v. Stella D'Cruz* [1985] 1 LNS 47 and we are aware that the unsecured creditors of City Centre have a right to a speedy and cost effective completion of City Centre's liquidation.

[77] We were mindful of the fact that City Centre was wound up more than ten years ago and that was on 25 April 2000. We were also mindful that if the sale is approved then City Centre's long drawn liquidation process would come to an end, once and for all.

[78] North Plaza submitted on the strength of *Re Edennote Ltd (No 2)* [1997] 2 BCLC 89 that we should not be concerned with the question of whether or not the sale will prejudice any other prospective purchaser of the lands and the manner by which the sale was to be conducted.

[79] Incidentally, the principles in *Re Edennote Ltd (No 2) (supra)* were vigorously applied by our High Courts in the case of *Abric Project Management Sdn Bhd v. Palmshine Palza Sdn Bhd & Anor* [2007] 7 CLJ 516 and in the case of *Re Kian Joo Holding Sdn Bhd; Abdul Jabbar Abdul Majid & Anor, Applicants* [1999] 4 CLJ 313. It was also applied by the English High Court in the case of *Leon v. York-O-Matic, Ltd And Others* [1966] 3 All ER 277.

[80] It must be recalled that before the High Court, the appellants objected to the sale of the lands on the grounds that the liquidator had acted improperly by allegedly "manipulating" the sale in this way:

(a) that the liquidator obtained "low valuations" of the lands to justify the sale;

(b) that the liquidator accepted North Plaza's bid despite the fact that North Plaza has a RM2 paid up capital as compared to SP Setia Berhad, the second highest bidder; and

(c) that the liquidator ignored and did not accept "offers" made by other parties such as Khong & Jaffar Sdn Bhd's offer dated 2 November 2006 and Messrs Jaspal Singh & Mohd Shah's offer dated 25 January 2007.

[81] We were urged to reject the appellant's objections for the following reasons:

(a) the appellants did not produce any valuation report to state that the value of the lands to be higher than the value as stated in the valuation reports prepared by Henry Butcher and Rahim & Co;

(b) that notwithstanding that North Plaza has only a RM2 paid up capital, it is a joint venture vehicle of Lion, AIG and Tasek and they are all well known *bona fide* property developers with substantial resources and we were also invited to take judicial notice that AIG is a multi-national corporation (s. 57(1) of the Evidence Act 1950; and *Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd* [1985] 1 LNS 122, SC);

(c) since North Plaza was the highest bidder, the liquidator made a commercial decision in City Centre's best commercial interest to accept North Plaza's bid;

(d) had the liquidator rejected North Plaza's bid, he would have breached his legal duty in not realising the only asset of City Centre and utilising the sale proceeds to pay off all of the appellant's creditors in priority over its contributories;

(e) that Khong & Jaffar Sdn Bhd's offer was a "bare offer" addressed to CTK's solicitors Messrs Megat Najmuddin Leong & Co and not to Henry Butcher who conducted the tender;

(f) that Khong & Jaffar Sdn Bhd's offer did not identify the "foreign company" which was interested in the lands and no earnest deposit was paid before the tender closed; and

(g) while Messrs Jaspal Singh & Mohd Shah's offer came after the tender had closed and was addressed to Messrs Megat Najmuddin Leong & Co and not to Henry Butcher and the offer also came after the SPA had been signed.

[82] The submissions of North Plaza and City Centre supported the High Court order dated 21 December 2009 that approved the sale and purchase of the lands dated 9 January 2007 between the liquidator and North Plaza. But the liquidator acted unilaterally and not with the committee of inspection - a requirement of the High Court order dated 26 July 2001.

[83] In arriving at the High Court order dated 21 December 2009, the learned High Court Judge held that:

(a) the words "bersama dengan Jawatankuasa Pemeriksaan" that appear in the High Court order dated 26 July 2001 merely echo the provisions of s. 241(1) of the Companies Act 1965 which empowers a liquidator to act on his own;

(b) section 236(2) of the Companies Act 1965 empowers a liquidator to sell immovable properties without reference to the committee of inspection; and

(c) the price at which North Plaza offered was reasonable and there was nothing sinister in regard to the RM5 million discount given by the liquidator.

[84] Here, the liquidator knew that he was appointed by consent with the committee of inspection. The High Court order dated 26 July 2001 is clear on this and it has not been set aside. Yet the liquidator acted unilaterally and gave RM5 million discount and entered into the SPA with North Plaza for the sale of the lands on 9 January 2007 and then he applied to the High Court by way of encl. 71 to seek approval of that sale. Obedience to the High Court order dated 26 July 2001 is a requirement of the law. Abdul Hamid Omar LP in *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210; [1993] 3 BLJ 123, SC, at p. 212 aptly said:

> Obedience to court order
>
> It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.

[85] Continuing at p. 213, Abdul Hamid Omar LP succinctly said:

> Orders of court must be treated with respect and require strict obedience.

[86] In *Hadkinson v. Hadkinson* [1952] 2 All ER 567, CA, at 569, Romer LJ had this to say:

> It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.

[87] Sir John Donaldson in *Howitt Transport Ltd v. Transport and General Workers' Union* [1973] ICR 1 at 10, observed that:

> First, orders of any court must be complied with strictly in accordance with their terms. It is not sufficient, by way of answer to an allegation that a court order has not been complied with, for the person concerned to say that he 'did his best'. The only

A exception to that proposition is where the court order itself only orders the person concerned to 'do his best'. But if a court order requires a certain state of affairs to be achieved, the only way in which the order can be complied with is by achieving that state of affairs.

B **[88]** Was there obedience to the High Court order dated 26 July 2001 by the liquidator? Certainly not and this question was not considered by the learned High Court Judge when approving the sale of the lands to North Plaza. In our judgment, the learned High Court Judge erred in law and in fact, in failing C to appreciate the terms and effect of the High Court order dated 26 July 2001 which provides that the liquidator be appointed to act with a committee of inspection. The learned High Court Judge erred in holding that the words "bersama dengan Jawatankuasa Pemeriksaan" which appear in the High Court order dated 26 July D 2001 merely echo the provisions of sub-s. 241(1) of the Companies Act 1965.

[89] The learned High Court Judge failed to appreciate the provisions of s. 237(1) of the Companies Act 1965 which E regulates the exercise and control of the liquidator's power. It provides that the liquidator shall in the administration of the assets of the company and distribution have regard to the directions given by resolution of the creditors/contributories or by the committee of inspection.

F **[90]** The High Court order dated 26 July 2001 did not disregard the provisions of s. 241(1) of the Companies Act 1965.

[91] It is clear that s. 241(1) of the Companies Act 1965 provides for the liquidator, if requested by the creditors/ G contributories, to summon separate meetings of creditors and contributories for purposes of determining if the creditors/ contributories require the appointment of a committee of inspection to act with the liquidator. If there is a request made, it is mandatory for the liquidator to summon meetings to determine H the appointment of a committee of inspection.

[92] Here, s. 241(1) of the Companies Act 1965 is not applicable because the High Court by its order dated 26 July 2001 has already made the determination that the liquidator is to I act with a committee of inspection. The liquidator, in our judgment, is obliged to do so. Sad to say, he did not.

[93] Section 236(2) of the Companies Act 1965 empowers the liquidator to sell immoveable property. The learned High Court Judge failed to appreciate that the exercise by the liquidator of the powers conferred on him by s. 236 of the Companies Act 1965 is subject to the control of the court as provided for in s. 236(3) of the same Act.

[94] It cannot be denied that the learned High Court Judge failed to appreciate that the liquidator does not have unfettered powers to act as he deems fit. He is limited in the exercise of his powers by the High Court order dated 26 July 2001 as well as the Companies Act 1965, to act with the committee of inspection.

[95] By way of encl. 71, the liquidator sought the sanction of the High Court for the sale of the lands. The lands were the only assets of City Centre. The learned High Court judge failed to appreciate that directions of the committee of inspection are mandatory for such sale. It is not an option on the part of the liquidator to act without the committee of inspection. In our judgment, the sale of the lands to North Plaza is tainted and sanction for the same should not have been granted by the learned High Court Judge.

[96] The learned High Court Judge was of the view that the liquidator was correct in his contention that s. 236(2) of the Companies Act 1965 empowered him to act alone and that the section in question does not require the liquidator to appoint or consult a committee of inspection in the sale of City Centre's assets.

[97] The upshot of the liquidator's contention and the decision of the learned High Court Judge meant that the consent order encapsulated in the High Court order dated 26 July 2001 must be construed subject to s. 236(2) of the Companies Act 1965 and that the order requiring the committee of inspection can readily be ignored. This meant that the liquidator can therefore act alone, unilaterally without the need to appoint a committee of inspection.

[98] Peh Swee Chin FCJ writing a separate judgment in the case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, FC, at p. 103 aptly said in regard to a perfected judgment:

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> Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior Court of unlimited civil jurisdiction in the course of contentious litigation.

B **[99]** Echoing the same sentiment in the same case, Gopal Sri Ram JCA at p. 113 remarked:

> Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected.

C **[100]** That being the case, it is our judgment that the liquidator has to comply with the High Court order dated 26 July 2001 unless it is set aside in a direct proceeding for that purpose.

[101] The validity of the High Court order dated 26 July 2001 cannot be attacked or challenged laterally as was done before the D learned High Court Judge and now before us. In *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd (supra)*, at p. 103, Peh Swee Chin FCJ had this to say:

> It is also long established that one can apply to set aside an order E of a superior court only in direct proceedings filed for the very purpose of having it set aside or (sic) (on) valid grounds, but without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first.

F **[102]** Surprisingly, the liquidator is challenging the validity of the High Court order dated 26 July 2001 when he submitted "that a court order cannot override or displace a statutory provision".

[103] If this is the position taken by the liquidator. then the High G Court order dated 26 July 2001 had overridden or displaced a statutory provision in the form of s. 236(2) of the Companies Act 1965, and that High Court order would then be invalid.

[104] Now, if the High Court order dated 26 July 2001 is to be treated as invalid as the liquidator wants this Court to make that H sort of order, then the liquidator's appointment under the High Court order dated 26 July 2001 would also become invalid and the sale of the lands to North Plaza cannot be authorised or validated.

I **[105]** We categorically say that the liquidator cannot blow hot and cold to suit him whenever he feels like it. He cannot approbate and reprobate in the same breath. On the one hand,

he claims that the High Court order dated 26 July 2001 overrides or displaces a statute which render the said order invalid and yet he has the audacity to continue to act as a liquidator by virtue of the said order. In the words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers Plc v. News (UK) Ltd And Others* [1990] 3 All ER 376, at pp. 383 to 384:

> There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

[106] It must be borne in mind that the High Court order dated 26 July 2001 is a consent order. And that consent order has been given by the creditors and contributories to appoint the liquidator provided that there is a committee of inspection.

[107] CTK voted specifically at the meeting convened by the official receiver on 28 May 2001 and he submitted during the hearing before the High Court on 26 July 2001 and he insisted that the consent order should include "together with the committee of inspection". CTK submitted that the purpose of the consent order was important in that the intentions of the creditors and contributories are consulted and for them to participate in all acts and decisions of the liquidator. What all these amount to is this. That the committee of inspection is to be the check and balance of the liquidator's act.

[108] When the liquidator filed encl. 71 and sought approval of the High Court for the sale of the lands to North Plaza, the learned High Court judge has to exercise her discretion judiciously. To approve the sale entered into by the liquidator with North Plaza would be to ignore the consent order recorded by another High Court judge *vide* the High Court order dated 26 July 2001 which consent order imposed the requirement that the liquidator must act with the committee of inspection. It would be unfair to approve the sale and it would be against the consensus and legitimate expectations of the contributories and creditors. It would, in our judgment, tantamount to varying the High Court order dated 26 July 2001.

[109] Richard Malanjum JCA (now Chief Judge, Sabah & Sarawak) writing for the Court of Appeal in *Zainudin Muhammad v. ATSCO Ltd & Anor* [2003] 1 CLJ 446, CA, at p. 448 had this to say in regard to a consent order:

> Now it is trite law that a consent order cannot be varied unless it is with the agreement of the other party or parties affected by it. Neither can it be set aside unless the conditions are met (see *Tio Chee Hing v. Tractors Malaysia Bhd* [1973] 1 MLJ 66; *Maria Chia Sook Lan v. Bank Of China* [1976] 1 MLJ 245; *Huddersfield Banking Co Ltd v. Henry Lister & Son Ltd* [1895] 2 Ch D 273; *Matthews v. Munster* [1886-90] All ER Rep 251).

[110] And whether the sale is in the best interest of City Centre should be decided by the liquidator together with the committee of inspection. It was argued on behalf of CTK that the contributories would be prejudiced if the sale is approved by this court. It was emphasised that the lands have greater potential value than merely being sold to North Plaza. At any rate, it was argued that the liquidator should have consulted the committee of inspection on the best opportunity to maximise the realisation of the lands profitability.

[111] Bearing in mind that the lands are the only assets of City Centre and it is the only property left in the golden triangle to be sold, the contributories and creditors should have been given an opportunity by the liquidator to decide with the liquidator whether the sale to North Plaza would have been the best opportunity to secure maximum realisation of the profitability of the lands considering the fact that there is no change in the price of the lands for the last 20 years (*Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors* [1989] 1 CLJ 157; [1989] 1 CLJ (Rep) 386).

[112] It was impressed upon us that CTK had earlier on mooted the idea of a joint venture with an intended purchaser in 2004 (Wimanis Sdn Bhd) to the liquidator in anticipation of a better and greater realisation of the profitability of the lands. Now, the fact that there was already other possibility other than a direct sale to North Plaza that by itself should have alerted and motivated the liquidator to change to a different mindset and consider the possibility that the contributories and creditors may wish to exercise other opportunity or avenue other than a direct sale to North Plaza.

[113] Clearly therefore, the liquidator had the opportunity to consider other mode of realisation of the potential of the lands but he closed his mind to it and merely considered a direct sale of the lands to North Plaza.

[114] It must be borne in mind that CTK had a genuine investor who was willing to deposit the sum of RM40 million for the payment of the creditors and was interested in a joint venture agreement to develop the lands. This golden opportunity would have provided for a maximum realisation of the profitability of the lands. This fact is evidenced when CTK filed for a stay under s. 243 of the Companies Act 1965 as reflected in encl. 148 of the court file. But, due to the delay caused by the opposition of the liquidator and the intervener for a period of almost two years, the genuine investor lost interest and decided to withdraw even though all the major creditors were in support of the idea.

[115] Be that as it may, the importance of a committee of inspection is set out in the case of *Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors* [2000] 1 LNS 335 (Case No: D2-28-187-1990, an unreported judgment of Abdul Aziz Mohamed J (later FCJ) dated 31 May 2000). His Lordship, in a well written judgment, held at p. 44:

> Section 241(1) says that the COI is 'to act with the liquidator'. A liquidator can exercise his powers under section 236(1) only with the authority of the Court or of the COI. In that respect the liquidator is subordinate to the COI.

[116] Continuing at pp. 45 to 47, his Lordship had this to say:

> One thing to note is that the COI, as is the general body of creditors and contributories, are not advisers to the liquidator. They are people, as representing the creditors and contributories, who have claims on the company. They are the master. The liquidator is to serve their interests. So they are empowered, as they naturally should be, to give directions to the liquidator. Directions are akin to orders, and a direction given when there is a right to give it is *prima facie* entitled to obedience. Section 237 does not go so far as to oblige a liquidator to obey the directions of the COI, but it requires the liquidator to 'have regard to' them. To have regard to them means to respect them and give them due consideration with a view to obeying them. Since the question is one of giving regard to directions, as opposed to

advice, I would say that in law the liquidator is obliged to lean towards obeying them unless for good reasons he thinks they should not be obeyed. But in that case it would not be safe for them to simply proceed to act contrary to the directions. The safe course would be to summon a general meeting of the creditors or contributories under subsection (2) to ascertain their wishes, and if these coincide with the directions of the COI which the liquidator feels should not be obeyed, then he should seek the directions of the Court under subsection (3).

The point to appreciate is that if a liquidator complies with the directions of a COI or appears to lean towards complying with them, he is acting consistently with the intention of section 237. He would be acting contrary to section 237 if he were to treat the directions and wishes of the COI as of secondary importance and brush them aside in order to maintain an appearance of independence. Where the COI has a wish or gives a direction, the liquidator is not supposed to be independent and rely entirely on the use of his own discretion. He is supposed to first of all have regard to the wish or direction of the COI. I use the word 'wish' because, in my opinion, a direction of the COI need not, for the purposes of section 237(1), appear as a direction. A wish of the COI is a direction to the liquidator. Their wish is his command.

The attitude of the petitioners is that the liquidators should be mindful of the fact that the winding up was ordered on the basis that the majority of the shareholders led by David Kuok had consistently took (sic) steps to prevent Peter Kuok from enjoying the fruits of his investments in these companies' and therefore it was necessary for 'particular care being taken by the liquidators to prevent any suggestion being made by one side or the other that they did not proceed with complete impartiality'. See paragraphs 2 and 3 of the petitioners' written submission. Those latter words are those of Street J in *Re Allebart Pty Ltd and the Companies Act* [1971] 1 NSWLR 24 at page 29A-B, but that case did not involve a COI or a section corresponding to our section 237(1). The petitioners go further to say in paragraph 4:

> The liquidators in this case treated the members of the Committees of Inspection (COIs) in this case as a typical COI in a winding up, ignoring completely the fact that these members in fact represent the very majority shareholders who had lost in the winding up petition.

In view of section 237(1), however, even with the background to the winding up being as it was, the liquidators could not do otherwise than treat a COI as a typical COI. As long as there is

> a COI, the liquidators are bound to conduct themselves towards the COI as required by the section. They have to have regard to the wishes and directions of the COI. It would have been impossible for them, their duty under section 237 being such, to take 'particular care', as the petitioners (or Peter) would wish them to have done, 'to prevent any suggestion being made by one side or the other that they did not proceed with complete impartiality'.

[117] We gratefully adopt the speech of his Lordship Abdul Aziz Mohamed J (later FCJ) in *Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors (supra)* to be the correct exposition of the law and we apply it vigorously to these three appeals before us. Now, the High Court order dated 26 July 2001 mandated the setting up of the committee of inspection and the liquidator has to take into account the wishes of the committee of inspection. The learned High Court judge in granting the approval for the sale failed to recognise the importance of establishing the committee of inspection and the need for the liquidator to have regard to the wishes of the creditors and contributories particularly in the light of the terms of the High Court order dated 26 July 2001.

[118] In our judgment, the liquidator acted in breach of the High Court order dated 26 July 2001 and he cannot use the court to legalise his unlawful acts. This court has the jurisdiction to stop the sale to North Plaza when there is lack of good faith and error in law.

Conclusion

[119] For the reasons alluded to above, we unanimously made the following orders:

Civil Appeal No: W-02(IM)-124-2010

> We allowed the appeal with costs of RM20,000. We set aside the decision of the High Court. We ordered that the deposit to be refunded to the appellant.

Civil Appeal No: W-02(IM)-286-2010

> We allowed the the appeal with costs of RM20,000. We set aside the decision of the High Court. We ordered that the deposit to be refunded to the appellant.

A Civil Appeal No: W-02(IM)-287-2010

We allowed the appeal with costs of RM20,000. We set aside the decision of the High Court. We ordered that the deposit to be refunded to the appellant.

B **[120]** This judgment in draft has been shown to my learned brothers Sulong Matjeraie, JCA and Ramly Hj Ali, JCA and they both expressed their concurrence with it.

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